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Azmer bin Idris, ex parte Malaysia Debt Ventures Bhd

B HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D-29NCC-4099–08 OF 2015
AZIZAH NAWAWI J
10 FEBRUARY 2017

C *Bankruptcy — Bankruptcy proceedings — Application for stay of proceeding — Whether sufficient reason shown warranting stay — Whether judgment debtor was social guarantor — Whether bankruptcy proceeding against Syariah principles — Bankruptcy Act 1967 ss 2 & 97*

D This was an application by the judgment debtor ('JD') to stay the bankruptcy proceedings and to set aside the bankruptcy notice ('BN') and the creditors petition ('CP'). Vide a letter of offer dated 14 October 2010, the judgment creditor ('JC') had granted a murabahah facility to the principal debtor in the sum of RM4,555,000. When the principal debtor breached the murabahah E facility, the JC sued the principal debtor and the JD. On 2 October 2014, a summary judgment was entered against the principal debtor and the JD. The issue then was whether the JD had adduced sufficient reasons for a stay of this bankruptcy proceeding. The JD submitted that: (a) the JD was a social F guarantor under s 2 of the Bankruptcy Act 1967; and (b) by proceeding with this bankruptcy action, the JC had acted in an oppressive, unjust, unreasonable and contradictory manner against the Syariah principles of *Zulm* and/or Syariah principles of justice.

G **Held**, dismissing the application with no order as to costs:

(1) The JD could not fall within the definition of 'social guarantor' because the purpose of the loans was to finance the acquisition of the manufacturing equipment of the principal debtor company, of which the H JD was one of the directors (see para 12).

(2) Under cl 4.1, the guarantee was a continuing security which may be 'enforced without first having recourse or having exhausted any other remedy or security'. Therefore, there was no necessity for the JC to enforce other securities before commencing with these bankruptcy I proceedings against the JD (see para 15).

(3) The bankruptcy court could not question the validity of the summary judgment, upon which these bankruptcy proceedings were premised upon (see para 17).

[Bahasa Malaysia summary

Ini adalah permohonan penghutang penghakiman ('JD') untuk menggantung prosiding kebankrapan dan mengenepikan notis kebangkrapan ('BN') dan petisyen pemiutang ('CP'). Melalui satu surat tawaran bertarikh 14 Oktober 2010, pemiutang penghakiman ('JC') telah menawarkan kemudahan murabahah kepada penghutang utama berjumlah RM4,555,000. Pada ketika penghutang utama mengingkari kemudahan murahabah, JC mengambil tindakan terhadap penghutang utama dan JD. Pada 2 Oktober 2014, satu penghakiman terus dikenakan terhadap penghutang utama dan JD. Isu yang berbangkit adalah sama ada JD mempunyai alasan yang mencukupi untuk menggantung prosiding kebankrapan. Penghutang penghakiman berhujah bahawa: (a) dia merupakan penjamin sosial di bawah s 2 Akta Kebankrapan 1967; dan (b) dengan meneruskan dengan tindakan kebankrapan semasa, JC telah bertindak dalam penindasan, tidak adil, tidak munasabah dan bercanggah terhadap prinsip Syariah *Zulm* dan/atau prinsip keadilan Syariah.

Diputuskan, menolak permohonan tanpa perintah untuk kos:

(1) Penghutang penghakiman tidak boleh tertakluk di bawah maksud 'penjamin sosial' kerana tujuan pinjaman itu adalah untuk menampung pembelian alatan pembuatan kilang milik penghutang utama, yang mana penghutang penghakiman adalah salah seorang pengarah syarikat (lihat perenggan 12).

(2) Di bawah klausa 4.1, jaminan adalah satu cagaran yang berterusan yang boleh dikuatkuasakan tanpa mengecualikan remedi-remedi atau cagaran yang lain. Oleh itu, pemiutang penghakiman tidak mempunyai keperluan untuk kuatkuasakan mana-mana cagaran sebelum memulakan prosiding kebankrapan terhadap penghutang penghakiman (lihat perenggan 15).

(3) Mahkamah kebankrapan tidak boleh mempersoalkan kesahihan penghakiman terus yang menjadi sandaran kepada tindakan kebankrapan semasa (lihat perenggan 17).]

Notes

For a case on bankruptcy proceedings in general, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3340.

Cases referred to

Rosli Abdul Kadir; Ex P Bank Kerjasama Rakyat Malaysia Bhd, Re [2008] 5 CLJ 691, HC (folld)

Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304, SC (refd)

Thangarajoo a/l Vyran v Denko Industrial Corp Bhd [2012] 7 MLJ 711; [2013] 1 CLJ 286, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 2, 97

Yap Chiu Wan (Goh Siu Lin with him) (Shook Lin & Bok) for the judgment creditor.

Tang Kat Meng (Tang & Lee) for the judgment debtor.

Azizah Nawawi J:

APPLICATION

[1] Enclosure 11 is an application by the judgment debtor ('JD') to stay the bankruptcy proceedings and to set aside the bankruptcy notice ('BN') and the creditors petition ('CP'). On the hearing date, the JD withdraw the application to set aside the BN and the CP and proceeded with the application to stay the bankruptcy proceedings pending the disposal of this application.

[2] The grounds of the application are:

(a) that the judgment creditor ('JC') has obtained a judgment against the JD, who stood as a guarantor for a company, MCI Bio-Peptide Sdn Bhd ('principal debtor');

(b) that the JD was liable as a guarantor for the principal debtor's debts pursuant to the *Murabahah* finance facility taken by the principal debtor; and

(c) that by proceeding with this bankruptcy action, the JC has acted in an oppressive, unjust, unreasonable and contradictory manner against the Syariah principles of *Zulm* and/or Syariah principles of justice.

THE SALIENT FACTS

[3] Vide a letter of offer dated 14 October 2010, the JC has granted a *Murabahah* facility to the principal debtor in the sum of RM4,555,000. The purpose of the facility was to finance the purchase of 'production/manufacturing equipment and the IT system'.

[4] As part of the security of the facility, the directors of the principal debtors have to execute joint and several guarantee, which have been duly executed by the directors, including the JD himself.

[5] When the principal debtor breached the *Murabahah* facility, the JC sued the principal debtor and the JD. On 2 October 2014, a summary judgment was entered against the principal debtor and the JD. There was no appeal against the summary judgment. It is based on this judgment that the JC has

commenced this bankruptcy proceeding.

FINDINGS OF THE COURT

[6] This application is premised on s 97 of the BA 1967, which reads:

> The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.

[7] Section 97 of the BA 1967 was considered in the case *Thangarajoo a/l Vyran v Denko Industrial Corp Bhd* [2012] 7 MLJ 711; [2013] 1 CLJ 286, where the court applied the principle in the case of *Re Rosli Abdul Kadir; Ex P Bank Kerjasama Rakyat Malaysia Bhd* [2008] 5 CLJ 691 which held that the 'sufficient reason' in s 79 is a lower threshold than the 'special circumstances' test in an ordinary application for stay of execution of a judgment pending appeal.

[8] In *Re Rosli Abdul Kadir*, Justice Ramly made a distinction between the statutory words 'sufficient reason' in s 97, and the words 'special circumstances', which are not derived from statutes, but is a creation of the court. In view of the distinction, His Lordship held that the test for applications under s 97 and stay of execution of judgment pending appeal cannot be the same. In para 21, His Lordship concluded:

> [21] In conclusion on this issue, the court finds that the test to warrant the court's discretion to grant or refuse the application is for the judgment debtor to show 'sufficient reason' and not 'special circumstances'. *Thus the judgment debtor's burden is to prove 'sufficient reason' is much lighter than to prove 'special circumstances'.*

[9] Applying the above principle, the issue then is whether the JD has adduced sufficient reasons for a stay of this bankruptcy proceeding. The JD gave two main reasons for the stay of this bankruptcy proceeding;

(a) that the JD is a social guarantor under s 2 of the Bankruptcy Act 1967 ('the BA 1967'); and

(b) that by proceeding with this bankruptcy action, the JC has acted in an oppressive, unjust, unreasonable and contradictory manner against the Syariah principles of *Zulm* and/or Syariah principles of justice.

[10] On the issue of social guarantor, the JD submits that he is a social guarantor under s 2 of the BA 1967, which defines a 'social guarantor' as a person who, not for the purpose of making profit, provides guarantees on the following:

A (a) a guarantee for loan, scholarship or grant for educational or research purposes;

(b) a guarantee for hire purpose transaction of a vehicle for personal or non-business use;

B (c) a guarantee for a housing loan transaction solely for personal dwelling.

[11] The JD submits that since the loan facilities are for research and development and commercialisation, therefore the JD is a social guarantor.

C

[12] However, I am of the considered opinion that the JD cannot fall within the definition of 'social guarantor' because the purpose of the loans was to finance the acquisition of the manufacturing equipment of the principal debtor company, of which the JD was one of the directors. Added to that, the D guarantee is part of the securities required under the finance facilities, which was to benefit the principal debtor, of which the JD was both the shareholder and director.

[13] The second issue raised by the JD is that since the *Murabahah* is an E Islamic Finance facility, then there must be Syariah compliance at all levels, and that the JC should have exhausted all recourse against the available assets of the principal debtor before commencing these bankruptcy proceedings against the JD.

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[14] It is the submission of the JC that there is no necessity for the JC to enforce other securities before commencing with these bankruptcy proceedings against the JD pursuant to the personal/joint and several guarantee dated 2 March 2011 ('guarantee dated 2 March 2011').

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[15] I am of the considered opinion that pursuant to cl 2.4 of the guarantee dated 2 March 2011, the guarantee is only discharged by full performance. Under cl 4.1, the guarantee is a continuing security which may be 'enforced without first having recourse ... or ... having exhausted any other remedy or H security ...'. Therefore, I agree with the JC that there is no necessity for the JC to enforce other securities before commencing with these bankruptcy proceedings against the JD.

[16] The JD also submits that the JC has failed to comply with the Syariah I principles by failing to disburse the loan facility in a timely manner thereby causing undue delay which results in the failure of the project undertaken by the principal debtor. Added to that, the JD also submits that the receiver and manager had disposed the machineries as scrap, when the assets are said to be worth more than RM5.6m.

[17] On this issue, I agree with the JC that this bankruptcy court cannot question the validity of the summary judgment, upon which these bankruptcy proceedings were premised upon. In *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304, the Supreme Court held at p 305:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment *(see In Re Easton (1893) 10 Mor 111; 9 TLR 409). Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings*. (Emphasis added.)

[18] Therefore, based on the above case also, it is not open to the JD to challenge the execution proceedings undertaken by the receiver and manager ('R&M') appointed by the JC under the debentures dated 2 March 2011 with regards to disposal of the equipment at the factory.

[19] Added to that, in exh 'MDV9', the R&M has issued several letters to the shareholder and directors of the principal debtor, including the JD himself, to participate in the exercise to sell of the charged assets of the company. The R&M received only one offer from one of the directors, Mr Lee Chan Kok for the sum of RM30,000. The R&M has rejected this offer as the same was substantially lower than the market value. The R&M did a tender exercise which results in the disposal of the charged assets at RM108,000. As the R&M is empowered under section 8.02 of the debenture to take all the necessary actions to dispose the charged assets, it cannot be said that the R&M are in breach of the same.

[20] Premised on the reasons enumerated above, I am of the considered opinion that the JD has failed to show sufficient reasons for the granting of stay and therefore the JD's application is dismissed with no order as to costs.

Application dismissed with no order as to costs.

Reported by Kamarul Anwar